

1 Q Why is it that you're able to say with
2 certainty that there are trade secrets there, even
3 though you don't have the definition?

4 A Because I've been through that exercise, I know
5 they're there. I've done exactly what I've just told
6 you.

7 Q What are they?

8 A I don't recall.

9 Q You do not remember a single trade secret that
10 is on those computers, or that was on those computers
11 when you installed software in 1999, right?

12 A I don't recall in the way you're asking the
13 question to enunciate, articulate the trade secret
14 contained in the files that's on the software that I
15 installed on those computers in 1999.

16 Q Okay. You've sued a company called ES3, right?

17 A Yes.

18 Q Please state every fact on which you base your
19 claim against ES3.

20 A I'm not sure if I can recall all the pieces,
21 but I'll --

22 Q Tell me every fact that you are aware of, as
23 you sit here today, that supports your claim against
24 ES3.

25 A They're essentially in the logistics business.

1 They have common ownership of -- what do you call it
2 -- officers, directors, stock, all that kind of stuff
3 -- with C&S. They share the same physical servers,
4 IP's and network, as C&S. They make claims to be
5 doing similar work as Fleming's logistics department
6 claim to do.

7 Q Anything else?

8 A There's more. I can't remember all the pieces
9 as we're sitting here.

10 Q You made a reference to sharing the same server
11 as C&S. I take it that's a server on the mainland
12 someplace?

13 A That's what it appeared as, yes.

14 Q Do you have any evidence whether anything
15 authored by you is on that server?

16 MR. HOGAN: Objection as to the term "on,"
17 vague and ambiguous, in the digital millennium world.

18 A If my recollection is correct, the analysis I
19 did of the IP's and the appearance of the network for
20 C&S, ES3, appeared as though they were all transparent
21 and all connected. It's safe to assume that if C&S
22 has my stuff on their systems, ES3 has access to it.

23 Q (By Mr. Smith): That is an assumption on your
24 part, correct?

25 A It's an assumption based on observed facts.

1 Q Please state any facts that you are aware of
2 that indicate that the server that ES3 shares with C&S
3 contains anything authored by you.

4 MR. HOGAN: Objection, vague as to the terms
5 "contains" under the Digital Millennium Copyright Act,
6 vague and ambiguous.

7 A As I just said, from the appearance of the
8 networks, there's a transparency there.

9 Q (By Mr. Smith): I'm not asking you what your
10 opinion is. I'm asking what are the facts on which
11 you base your conclusion?

12 A Well, my opinion is based on facts.

13 Q Please state the facts.

14 MR. HOGAN: Objection, asked and answered.

15 A Asked and answered.

16 Q (By Mr. Smith: Please state what facts you are
17 aware of. Not that you did an analysis. Please state
18 what facts you are aware of that indicate to you that
19 the server that C&S uses in the mainland someplace
20 that you say it shares with ES3 has something authored
21 by you on it. Please state the facts.

22 MR. HOGAN: Objection, vague as to the term
23 "authored by you on it."

24 Q (By Mr. Smith): If you are aware of any facts,
25 please state them.

1 A I've given you all the facts that I can
2 remember at this point.

3 Q (By Mr. Smith): Please state them again.

4 MR. HOGAN: Objection, asked and answered.

5 Counsel's question admits it's a second time around.

6 A Asked and answered.

7 MR. HOGAN: I get to say that. You don't.

8 Q (By Mr. Smith): Are you refusing to answer?

9 MR. HOGAN: Go ahead and say it again.

10 MR. SMITH: Please read the question back.

11 MR. HOGAN: And please read his answer back.

12 (Record read as follows:

13 "Q Please state any facts that you are
14 aware of that indicate that the server that
15 ES3 shares with C&S contains anything
16 authored by you.

17 A As I just said, from the appearance of
18 the networks, there's a transparency there.")

19 Q (By Mr. Smith): Okay. I'm not asking about
20 the appearance of the networks or what you think the
21 appearance of the networks is. I'm asking what are
22 the facts on which you base that conclusion, if you
23 can identify any?

24 A That's the only facts I have at this time.

25 Q Is that there's an appearance of a transparency

1 would be speculation for you to try to say if anybody
2 else has done that?

3 MR. HOGAN: I think you misstate my objection,
4 Counsel. I think maybe if you're done maybe we can
5 take a break, five-minute break?

6 MR. SMITH: I don't think we need a break, do
7 we?

8 MR. HOGAN: How long have we been going?

9 MR. SMITH: Not very long.

10 MR. LIEBELER: We didn't really take a break
11 after my exam. Let's take five, Lex.

12 MR. SMITH: Okay.

13 MR. HOGAN: Let's take five.

14 THE VIDEOGRAPHER: The time is 13:35 p.m. and
15 we are off the record.

16 (Break.)

17 THE VIDEOGRAPHER: The time is 13:41 p.m. and
18 we're back on the record.

19 Q (By Mr. Smith): Mr. Berry, you've also sued
20 someone named Richard Cohen in this case; is that
21 right?

22 A Yes.

23 Q Please state each fact on which you base your
24 claim against Mr. Cohen.

25 A Which claim?

1 Q All claims that you're making against him.

2 A Well, he seems to be the owner or principal
3 shareholder of C&S, the C&S acquisitions, the LLC's,
4 the C&S Logistics of Hawaii, ES3, all those different
5 names. He was -- obviously gave his approval for this
6 transaction. He's the ultimate authority of accepting
7 the transfers of all my software and things from
8 Fleming.

9 Q Anything else?

10 A I'm sure there's other things. That's all I
11 can think of at the moment.

12 Q You said he approved this transaction. Which
13 transaction are you talking about; the acquisition of
14 the Fleming assets?

15 A Well, I think there was a series of
16 transactions, if I'm not mistaken.

17 Q Okay. Is that the series of transactions that
18 culminated with the C&S acquisition of Fleming assets?

19 MR. HOGAN: I'm going to object, vague and
20 ambiguous as to the term "Fleming assets." I don't
21 think anybody is claiming that Fleming assets gave
22 rise to any claim.

23 Q (By Mr. Smith): I'm just trying to understand
24 what the transaction is that you say Mr. Cohen
25 approved.